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from one to the other on the ground of fraud or want of consideration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126-136, 165, 415-417, 419, 424; Dec. Dig. § 52;* Equity, Cent. Dig. §§ 469, 470; Dec. Dig. § 202.* 13 Va.-W. Va. Enc. Dig. 921; 15 Va.-W. Va. Enc. Dig. 1093.]

Appeal from Circuit Court, Norfolk County.

Bill by Samuel W. Lyons against Narcissus C. Eason and another. From a decree for complainant, the named defendant appeals. Affirmed.

L. D. Starke and *D. Tucker Brooke*, both of Norfolk, for appellant.

Frank L. Crocker, of New York City, for appellee.

HARDY et al. v. COLEY et al.

March 13, 1913.

[77 S. E. 458.]

Judicial Sales (§ 41*)—Resale—Advance Bid.—A judicial sale should not be set aside and a new sale ordered solely because an advance bid of 10 per cent. has been ordered.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 79; Dec. Dig. § 41.* 8 Va.-W. Va. Enc. Dig. 773; 14 Va.-W. Va. Enc. Dig. 615; 15 Va.-W. Va. Enc. Dig. 577.]

Appeal from Circuit Court, Mecklenburg County.

Judicial sale to James Hardy and another, in the suit of Isabella Coley against Luther Coley and others, was set aside, and a resale ordered, and said purchasers appeal. Reversed.

Irby Turnbull, of Boydton, and *Morton G. Goode*, of Dinwiddie, for appellants.

Reekes & Bedinger, of Boydton, for appellees.

J. B. KING & Co. v. C. W. HANCOCK & SONS.

March 13, 1913.

[77 S. E. 510.]

1. Depositions (§ 56*)—Notice—Service—Mode of Service—Mail.—Code 1904, § 3362, provides that reasonable notice shall be given to the adverse party of taking every deposition; and section 3207 declares that a notice may be served by delivering a copy to the party in person, or, if he be not found at his usual place of abode,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

to his wife, or any person found there, who is a member of his family, above 16 years of age, or, if neither he nor his wife, nor any such person, can be found there, by leaving such copy posted at the front door of his place of abode. Held that, where the adverse party is a resident of the state, service of notice to take depositions on the party's attorney by mail was insufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 90-117; Dec. Dig. § 56.* 4 Va.-W. Va. Enc. Dig. 559; 14 Va.-W. Va. Enc. Dig. 334.]

2. Depositions (§ 56*)—Notice—Service—Party.—Under Code 1904, § 3362, requiring reasonable notice of the taking of depositions to be given to the adverse party, notice to the attorney of the adverse party, who is a resident of the state, was insufficient, in the absence of waiver of notice to the party.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 90-117; Dec. Dig. § 56.* 4 Va.-W. Va. Enc. Dig. 559; 14 Va.-W. Va. Enc. Dig. 334.]

3. Depositions (§ 107*) — Notice — Service on Party — Waiver — Service on Attorney.—Service of notice to take depositions having been made by mail, the depositions were not filed with the clerk; and that they had been taken pursuant to a notice sent by mail was not made known to defendants or their counsel until the cause had been called for trial and the jury sworn. Held, that defendant's failure to object to the form of the transmission of the notice, etc., until the trial had commenced was not a waiver of the defect.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 309-319; Dec. Dig. § 107.* 4 Va.-W. Va. Enc. Dig. 584; 14 Va.-W. Va. Enc. Dig. 334; 15 Va.-W. Va. Enc. Dig. 286.]

4. Appeal and Error (§ 1064*)—Instructions—Burden of Proof—Prejudice.—Where, in an action for the price of goods sold, defendants proved beyond controversy that the goods were damaged when received, plaintiff was not prejudiced by instructions on the burden of proof assuming that the goods were damaged, and placing the burden on plaintiff to show that they were in good condition when they were shipped, or were delivered in an undamaged condition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.* 1 Va.-W. Va. Enc. Dig. 600; 14 Va.-W. Va. Enc. Dig. 96; 15 Va.-W. Va. Enc. Dig. 70.]

5. Trial (§ 252*)—Instructions—Applicability to Evidence.—Where, in an action for plaster finish sold to contractors for a building, and refused for alleged defects, plaintiff's agents thereafter were permitted to use a portion thereof to plaster another building, which work was accepted after it had been performed at a cost so excessive as to make the use of the plaster unprofitable and impracticable,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

plaintiff was not entitled to an instruction that, if the jury believed that defendants received the plaster and exercised acts of ownership over it, or allowed any parties to use it on their contract or for their use, then they should find that defendants accepted the goods and were liable for the purchase price.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

6. Trial (§ 253*)—Instructions—Ignoring Issues.—Where, in an action for the price of plaster finish, defendant pleaded breach of warranty in the nature of a plea of set-off, on which plaintiff took issue, an instruction that, if defendants received the plaster and exercised acts of ownership over it, then they accepted the goods, and were liable for the price, was properly refused as ignoring the defense of breach of warranty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.* 7 Va.-W. Va. Enc. Dig. 723; 14 Va.-W. Va. Enc. Dig. 564; 15 Va.-W. Va. Enc. Dig. 515.]

7. Sales (§ 284*)—Defective Quality.—Where plaintiff sold defendants certain plaster finish under a warranty of quality, and the finish, when delivered, was in such condition that it was worthless for the purpose for which it was brought, and the expense incurred on account of it was greater than its value, plaintiff could not recover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803-805; Dec. Dig. § 284.* 13 Va.-W. Va. Enc. Dig. 661; 14 Va.-W. Va. Enc. Dig. 1069; 15 Va.-W. Va. Enc. 1062.]

Error to Circuit Court of City of Lynchburg.

Action by J. B. King & Co. against C. W. Hancock & Sons. Judgment for defendant, and plaintiff brings error. Affirmed.

Kenneth S. Jones, of Norfolk, for plaintiff in error.

Harrison & Long, of Lynchburg, for defendant in error.

Note.

Service of Notice of Taking of Depositions Where Adverse Party Resident of State.—Notice of taking depositions is not sufficient if given to the attorney at law, in the absence of the principal from the commonwealth, but ought to be given to the agent or attorney in fact, or, if there be none, by publication in the manner prescribed by law. *Cahill v. Pintony*, 4 Munf. 371.

Where a notice to take depositions was left with the wife of the party at his dwelling house when it was known by the adverse party that he was absent on a journey to another state, and where it appeared also that the notice might previously have been given to the party himself, and that the taking of the deposition might have been postponed till his return, it was held in *Coleman v. Moody*, 4 Hen. & M. 1, that the notice was insufficient, and the deposition taken under it was suppressed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.